

May 31, 2013

Linda Helm  
NEPA Coordinator  
Nez Perce – Clearwater National Forests  
Supervisor's Office  
104 Airport Road  
Grangeville, ID 83530

Sent Via Email and US Mail

Dear Ms. Helm,

We wish to comment on the scoping letter, which includes a list of projects. These comments are on behalf of Friends of the Clearwater and Alliance for the Wild Rockies.

### **Kelly Creek Cabin**

We have a few questions about this project. Does the Forest Service use this cabin? For what purpose does the Idaho Department of Fish and Game use it? What are the costs to the Forest Service in terms of its administration? What is a more accurate portrayal of necessary management practices for the cabin? Without more background information, it is hard to provide meaningful input on this proposal.

### **Big Creek Road**

This is a project that needs more analysis and would benefit from an Environmental Assessment. Road realignment could have significant impacts on water quality. This would involve major reconstruction work.

### **Laird Park Play Equipment**

The agency should ask itself whether this kind of urban park infrastructure is appropriate for a national forest. Rather than replacing the equipment, the agency should consider removing the worn out and apparently dangerous old equipment. People would still recreate here, but the setting would be more in keeping with a national forest.

### **Bridge Creek Trail**

Friends of the Clearwater provided the Forest Service with photos showing damage to this trail in our comments on the travel plan, dated February 26, 2009. Please include those comments as part of this comment record. This route should be closed to **all** motorized vehicles because of the damage done to the trail. Our photo documentation has shown that it is not just ATVs, though that damage is obvious, but motorcycles that cause damage to the route.

### **Cook Ranch Trail**

Most of the first four miles of the trail is flat, along Big Mallard Creek, until it crosses the creek and climbs out of Cook Ranch. This is where the map shows the work would occur. This trail receives little use and is an appropriately wild access to the Frank Church-River of No Return Wilderness. That same character needs to be maintained while doing this trail work.

### **Bagley Creek Placer**

This activity would occur within the RHCA on Bagley Creek, which is part of the Noble Creek watershed. It is also adjacent to or within land that is contiguous to the Cove (Gospel Hump) roadless area. As such, a CE is inadequate. An EIS is needed to develop roadless land.

Further, this is not a project that would last for less than a year. Rather it would occur in 2013 and could go to the end of the 2014 season, according to the scoping letter. Forty to forty five test pits are an excessive amount to be dug within the allotted timeframe. A CE is inadequate.

## Roadless

The old trail that would be used for access crosses from the clearcuts from the small sales of the infamous Cove-Mallard timber sales. Into country that is roadless.

A decision to develop a roadless area is "environmentally significant" [*Smith v. US Forest Service*, No. 93-36187 (9th Cir. Aug. 22, 1994)] Case law in *Kettle Range Conservation Group v. USFS* makes it clear the on-the-ground situation is what determines roadless nature of an area, not past analyses or documents or faulty inventories. The fact the area is not in one of the areas identified in the Idaho Roadless Rule is irrelevant. It is what is on the ground. The facts in the *Smith* case are a good example of this situation. *Smith* challenged a sale in the Colville National Forest on an area, in part, which the Forest Service had determined was roaded in its 1988 Forest Plan. *Smith* alleged that the impact of the sale on a 6,000-acre roadless area that included part of the inventoried Twin Sisters area and part uninventoried area had not been adequately addressed. *Smith* at 1075. The Forest Service argued that the Washington State Wilderness Act released the agency from considering the wilderness option of RARE II areas. *Id* at 1077-8. However, *Smith's* argument was that the WSWA does not excuse the agency from considering the effect of a logging project on the roadless character of uninventoried land.

That is the issue here. Furthermore, just because a roadless area is not viewed by the Forest Service as suitable for wilderness designation doesn't mean it is no longer roadless. Case law is extremely clear that even areas that are not as pure as the agency thinks they should be for wilderness designation, are under the same legal mandates for analysis as roadless areas an agency believes do have roadless or wilderness character (see *Wyoming Outdoor Coordinating Committee v. Butz*, 484 F.2d 1244 (10th Cir. 1973) In *WOCC v. Butz* the 10th Circuit decided that the Forest Service needed to do an Environmental Impact Statement on the effects of building roads and logging within the Teton National Forest in Wyoming, despite the fact that the agency questioned its roadless character.

The definition of a road found in the House Committee Report on FLPMA is:

The word "roadless" refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

## Water Quality

Recent case law from Idaho addressing exploratory mineral drilling and groundwater/water quality issues should have been addressed (including, as found by the Court, a full analysis of baseline groundwater conditions and project impacts). *Idaho Conservation League v. U.S. Forest Service*, 11-cv-0341-EJL (D. Idaho Aug. 29, 2012). Exploratory test pits in the riparian zone of this nature could have unexpected consequences on water quality. Being 20 feet from the stream almost guarantees there will be impacts

The scoping letter is unclear as to how the point source discharge into the pits and eventual disposal might affect the stream and how much water will be taken from the stream. Will the amount affect fish during low flows? An EIS needs to address whether these are point sources under the Clean Water Act where NPDESs are required. It would seem an NPDES is required in both cases, as the Federal courts have expressly held that the outfall from in-stream placer mining equipment is a point source discharge under the CWA that cannot proceed without an NPDES permit. (*Trustees for Alaska*, 749 F.2d 539 (9th Cir. 1984)).

Under the CWA, a new point source discharge affecting a parameter associated with the 303(d) listing is prohibited. This nondegradation standard applies since any new discharge affecting these parameters would by definition violate the requirement that: "existing instream water uses and the level of water

necessary to protect the existing uses shall be maintained and protected.” (40 CFR 131.12(a)(1)).

(NOTE: this antidegradation standard means that no degradation will occur--not some degradation can occur as long as the beneficial uses are protected and standards are met. See, PUD No. 1 of Jefferson County v. Washington Department of Ecology, 114 S.Ct 1900(1994)).

Also, the Forest Service cannot meet its duty under the Clean Water Act (CWA, see also 36 CFR 228.8) to ensure that the project will comply with the CWA without an understanding of the specific nature of the discharges. There is not sufficient detail in the document.

MM2 of INFISH and PACFISH standards require that structures and other impacts be located outside of riparian habitat conservation areas (RHCAs). The scoping letter leads one to believe that activities will take place in Bagley Creek, or 20 feet from Bagley Creek, but the scoping letter provides little detail. It does not suggest that a stream ford is necessary but would take water from the stream. The inadequate map in the scoping letter shows the project area on both sides of the stream. The Forest Service cannot meet its duty under the Clean Water Act (CWA, see also 36 CFR 228.8) to ensure that the project will comply with the CWA without an understanding of the specific nature of the discharges. Also, will there be an expert in hydrology so the issue of wetlands can be properly assessed?

Water quality issues are not limited to the Clean Water Act. There are also requirements under the Endangered Species Act for the listed fish species and the Forest Plan for water quality and fish habitat. Conflating these requirements as simply water quality under the Clean Water Act is erroneous. We address this a bit further below.

An EIS needs to clearly document several things. First, how does the proposal comply with the Clean Water Act Section 401? In Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, \*4 (D. Or. 2006) the court held the claimant and agency needed to comply with this section. Second, the EIS needs to clearly demonstrate how this would comply with section 402 of the Clean Water Act and the requirement for an NPDES. Third, the EIS needs to demonstrate how this complies with section 404 of the CWA, specifically how does working within a stream not affect wetlands and who determines the wetland? Fourth, the EIS needs to demonstrate compliance with sections 303 and 313 of the CWA. Fifth, the EIS needs to demonstrate compliance with the ESA for listed fish species. It is hard to see how this project can go forth given how far within the RHCAs development is proposed to take place. The Forest Service must consult on listed species that are downstream or within the project area. Sixth, the EIS needs to show that the requirements of NFMA are met in regard to other native salmonids such as Westslope cutthroat trout or MIS species dependent upon aquatic or riparian environments. Monitoring information for MI and TE species must be included in the EIS and the EIS must demonstrate how the project meets forest plan requirements for fish habitat and water quality (Appendix A).

It should be emphasized the agency's duties under the ESA are not overridden by any “rights” the applicants may have under the 1872 mining law. The courts are clear in ruling that prohibitions under the ESA must be enforced, even to deny mining operation and: “of course, the Forest Service would have the authority to deny any unreasonable plan of operations or plan otherwise prohibited by law. E.g., 16 U.S.C. 1538 (endangered species located at the mine site). The Forest Service would return the plan to the claimant with reasons for disapproval and request submission of a new plan to meet the environmental concerns.” (Havasupai Tribe v. U.S., 752 F.Supp. 1471, 1492 (D. Az. 1990) affirmed 943 F.2d 32 (9th Cir. 1991) cert. denied 503 U.S. 959 (1992); See also Pacific Rivers Council v. Thomas, 873 F.Supp. 365 (D. Idaho 1995); Pacific Rivers Council v Thomas, 30 F.3d 1050 (9th Cir 1994) cert. denied 115 S.Ct. 1793 (1995)). The EA needs to clearly analyze this issue.

The issue of claim validity is important. This is important because the reasonableness of the proposed action needs to be adequately considered.

Activity or facilities that are “reasonably incident” will vary depending on the stage of mining activity. Through case law that has evolved since 1955, the reasonably incident standard has been interpreted to include only activity or facilities that are an integral, necessary, and logical part of an operation whose scope justifies the activity or facilities. Activities that are “reasonably incident” would be expected to be closely tied to, and be defined within, what would be reasonable and customary for a given stage of

mining activity. Such levels of activity would include initial prospecting, advanced exploration, predevelopment, and actual mining. Each stage is defined by an increasing level of data and detail on the mineral deposit that, in total, contribute to an increasing probability that the deposit can be mined profitably. Each stage also has an increasing impact on the land.

The logic of sequencing is also obvious to the Forest Service whose charge is the management of surface resources: Keep it small, to the extent practicable, and build, if warranted, from there. In other words, minimize the amount of disturbance to surface resources in order to prevent unnecessary destruction of the area, and to ensure to the extent feasible that disturbance is commensurate with each level of development.

Forty to forty five test pits are not a small number.

That simple principle is of paramount interest to the Forest Service that, by its Organic Act, is responsible on lands in the National Forest System “to regulate their occupancy and use to preserve the forest thereon from destruction.” Equally important, the principle has been articulated by the 9th Circuit Court in *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*. The Court clearly articulated that mining is a sequential process composed on logical steps. Further, mining activity that would cause significant surface disturbance on lands in the National Forest System must be related to a logical step in that process and the steps must be in the proper sequence.

The scoping letter lacks enough information to make that determination. The question must be asked, “Has the claimant made the discovery of a “valuable mineral deposit” on each claim to be used?” (30 U.S.C. 22). A mining claim location does not give presumption of a discovery. (*Ranchers Exploration v. Anaconda*). “[L]ocation is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim.” (*Cole v. Ralph*, 252 U.S. 286, 294-96 (1920)).

Simply put, the scoping letter provides too little information. The automatic assumption this is something that can be approved with a CE fails to take a hard look at the crucial issue of roadless values, RHCAs and whether this complies with PACFISH, the CWA, and forest plan standards.

### **Baldy Creek Placer/Heritage Gulch Placer/Holy Grail Placer/Orogrande/Bear Track Exploration**

With the exception of Orogrande, these activities would occur within RHCAs on Baldy Creek, which is part of the Newsome Creek watershed, Newsome Creek itself, in the Crooked Creek watershed, and in Meadow Creek. Newsome Creek flows into the South Fork, which is, water quality limited. All the projects could last for over one year so none of them meet the requirements of a CE.

Recent case law from Idaho addressing exploratory mineral drilling and groundwater/water quality issues should have been addressed (including, as found by the Court, a full analysis of baseline groundwater conditions and project impacts). *Idaho Conservation League v. U.S. Forest Service*, 11-cv-0341-EJL (D. Idaho Aug. 29, 2012). Exploratory test pits in the riparian zones and drilling in uplands could have unexpected consequences on water quality. Being 20 feet from the stream almost guarantees there will be impacts for those projects in RHCAs.

The scoping letter is unclear as to how the point source discharge into the pits and eventual disposal, even though it is offsite for some projects, might affect the streams and how much water will be taken from the streams. Will the amount affect fish during low flows? An EA needs to address whether these are point sources under the Clean Water Act where NPDESs are required. It would seem an NPDES is required in both cases, as the Federal courts have expressly held that the outfall from in-stream placer mining equipment is a point source discharge under the CWA that cannot proceed without an NPDES permit. (*Trustees for Alaska*, 749 F.2d 539 (9th Cir. 1984)).

Under the CWA, a new point source discharge affecting a parameter associated with the 303(d) listing is prohibited. This nondegradation standard applies since any new discharge affecting these parameters would by definition violate the requirement that: “existing instream water uses and the level of water

necessary to protect the existing uses shall be maintained and protected.” (40 CFR 131.12(a)(1)). (NOTE: this antidegradation standard means that no degradation will occur--not some degradation can occur as long as the beneficial uses are protected and standards are met. See, PUD No. 1 of Jefferson County v. Washington Department of Ecology, 114 S.Ct 1900(1994)).

Also, the Forest Service cannot meet its duty under the Clean Water Act (CWA, see also 36 CFR 228.8) to ensure that the project will comply with the CWA without an understanding of the specific nature of the discharges. There is not sufficient detail in the document.

MM2 of INFISH and PACFISH standards require that structures and other impacts be located outside of riparian habitat conservation areas (RHCAs). The scoping letter leads one to believe that activities will take place within 20 feet of streams, but the scoping letter provides little detail. It does not suggest that a stream ford is necessary but does show the project areas on both sides of the streams for the first three projects (NOTE: The maps are not good for any of the projects, though these are slightly better than the Bagley Creek project). The Forest Service cannot meet its duty under the Clean Water Act (CWA, see also 36 CFR 228.8) to ensure that the project will comply with the CWA without an understanding of the specific nature of the discharges. Also, will there be an expert in hydrology so the issue of wetlands can be properly assessed?

Water quality issues are not limited to the Clean Water Act. There are also requirements under the Endangered Species Act for the listed fish species and the Forest Plan for water quality and fish habitat. Conflating these requirements as simply water quality under the Clean Water Act is erroneous. We address this a bit further below.

An EA needs to clearly document several things. First, how do the proposals comply with the Clean Water Act Section 401? In Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, \*4 (D. Or. 2006) the court held the claimant and agency needed to comply with this section. Second, the EA needs to clearly demonstrate how these projects would comply with section 402 of the Clean Water Act and the requirement for an NPDES. Third, the EA needs to demonstrate how these proposals comply with section 404 of the CWA, specifically how does working within a stream not affect wetlands and who determines the wetland? Fourth, the EA needs to demonstrate compliance with sections 303 and 313 of the CWA. Fifth, the EA needs to demonstrate compliance with the ESA for listed fish species. It is hard to see how these projects can go forth given how far within the RHCAs development is proposed to take place. The Forest Service must consult on listed species that are downstream or within the project areas. Sixth, the EA needs to show that the requirements of NFMA are met in regard to other native salmonids such as a Westslope cutthroat trout or MIS species dependent upon aquatic or riparian environments. Monitoring information for MI and TE species must be included in the EIS and the EIS must demonstrate how the project meets forest plan requirements for fish habitat and water quality (Appendix A).

Also, cumulative impacts from these projects and other mining projects in the area (Premium) need to be evaluated. This is particularly important for the Baldy, Heritage and Orogrande Projects as that is where mining proposals have been recently concentrated and for Bear Track on the Salmon River District.

It should be emphasized the agency's duties under the ESA are not overridden by any “rights” the applicants may have under the 1872 mining law. The courts are clear in ruling that prohibitions under the ESA must be enforced, even to deny mining operation and: “of course, the Forest Service would have the authority to deny any unreasonable plan of operations or plan otherwise prohibited by law. E.g., 16 U.S.C. 1538 (endangered species located at the mine site). The Forest Service would return the plan to the claimant with reasons for disapproval and request submission of a new plan to meet the environmental concerns.” (Havasupai Tribe v. U.S., 752 F.Supp. 1471, 1492 (D. Az. 1990) affirmed 943 F.2d 32 (9th Cir. 1991) cert. denied 503 U.S. 959 (1992); See also Pacific Rivers Council v. Thomas, 873 F.Supp. 365 (D. Idaho 1995); Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir 1994) cert. denied 115 S.Ct. 1793 (1995)). The EA needs to clearly analyze this issue.

The issue of claim validity is important. This is important because the reasonableness of the proposed actions need to be adequately considered.

Activity or facilities that are "reasonably incident" will vary depending on the stage of mining activity. Through case law that has evolved since 1955, the reasonably incident standard has been interpreted to include only activity or facilities that are an integral, necessary, and logical part of an operation whose scope justifies the activity or facilities. Activities that are "reasonably incident" would be expected to be closely tied to, and be defined within, what would be reasonable and customary for a given stage of mining activity. Such levels of activity would include initial prospecting, advanced exploration, predevelopment, and actual mining. Each stage is defined by an increasing level of data and detail on the mineral deposit that, in total, contribute to an increasing probability that the deposit can be mined profitably. Each stage also has an increasing impact on the land.

The logic of sequencing is also obvious to the Forest Service whose charge is the management of surface resources: Keep it small, to the extent practicable, and build, if warranted, from there. In other words, minimize the amount of disturbance to surface resources in order to prevent unnecessary destruction of the area, and to ensure to the extent feasible that disturbance is commensurate with each level of development.

That simple principle is of paramount interest to the Forest Service that, by its Organic Act, is responsible on lands in the National Forest System "to regulate their occupancy and use to preserve the forest thereon from destruction." Equally important, the principle has been articulated by the 9th Circuit Court in *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*. The Court clearly articulated that mining is a sequential process composed on logical steps. Further, mining activity that would cause significant surface disturbance on lands in the National Forest System must be related to a logical step in that process and the steps must be in the proper sequence.

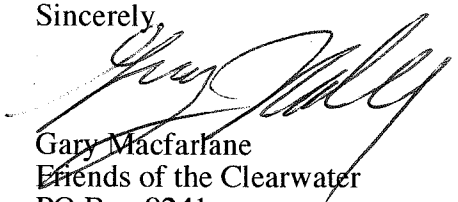
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Simply put, the scoping letter provides too little information. The automatic assumption this is something that can be approved with a CE fails to take a hard look at the crucial issue of RHCAs, impacts of drilling on groundwater (Orogrande), road construction (Orogrande) and whether these proposals comply with PACFISH, the CWA, and forest plan standards.

### **Adams Water Transmission**

Since a private well could be drilled on private land, that is much more appropriate than having a special use of the national forest.

Sincerely,



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and Board Member  
Alliance for the Wild Rockies